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No. 712

In the

Supreme Court of the United States

ANDREW JACKSON PATTERSON AND EVELYN DEWITT,
Appellants,

v.

CITY OF DALLAS,
Appellee.

On Appeal from the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas

MOTION TO DISMISS

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Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that this appeal be dismissed on the ground that it does not present a substantial federal question.

JURISDICTION

No substantial federal question is presented in this case and, therefore, no jurisdiction exists to review the decision of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas. The ordinance, both on its face and as

applied to Appellants, when construed in conjunction with the entire Code of the City of Dallas regulating massage establishments, is not beyond the allowable range of state action under the Fourteenth Amendment.

Ashwander v. Tennessee Valley Authority, 297 U. S. 288; *Holliday v. Governor of the State of South Carolina*, D. C. S. C., 78 F. Supp. 918, 924; Affirmed 69 S. Ct. 56, 335 U. S. 803, 93 L. ed. 360; *Murphy v. California*, 225 U. S. 623, 32 S. Ct. 697, 698, 56 L. ed. 1229; *Cronin v. Adams*, 192 U. S. 108, 24 S. Ct. 219, 48 L. ed. 365; *Cronin v. Denver*, 192 U. S. 115, 24 S. Ct. 220, 48 L. ed. 368; *Martin v. Wood*, 368 U. S. 25, 7 L. ed. 2d 5, 82 S. Ct. 1.

QUESTION PRESENTED

Whether, Section 8-28 of the Code of Civil and Criminal Ordinances of the City of Dallas, Texas, both on its face and as applied to Appellants, is repugnant to either the (1) Due Process Clause or (2) the Equal Protection Clause of the Fourteenth Amendment.

STATEMENT.

Massage establishments located in the corporate limits of the City of Dallas are regulated by Sections 8-1 through 8-29 of the Code of Civil and Criminal Ordinances of the City of Dallas (S. F. 57).

This Code provides for the licensing of massage establishments, revocation of a license, inspections, appeals and contains a provision against the massaging of a person of one sex by a person of another sex, a prohibition against the

employment of prostitutes in massage establishments and a prohibition against lewd, immoral or indecent acts committed in such establishments.

The ordinance in question was enacted by the governing body of the City of Dallas upon the recommendation of its police department after an investigation revealed that lewd acts were being committed in massage establishments arising from the massaging of a person of one sex by a person of another sex. The purpose of the ordinance in question, as shown on the face thereof, is to correct this evil and Section 8-28 regulates but does not prohibit the operation of a massage establishment. The provisions regulating massage establishments were enacted under the express Charter powers and under the general exercise of the police powers of the City of Dallas to prohibit, abate and suppress all things detrimental to the health, morals, convenience, safety, comforts and welfare of the inhabitants of the City of Dallas.

STATUTES INVOLVED

Section 23 of Article 1175, Vernon's Annotated Civil Statutes, State of Texas, contains the following enumerated powers of a Home Rule City:

> "Sec. 23. To license any lawful business, occupation, or calling that is susceptible to the control of the police powers."

Section 5 of the Charter of the City of Dallas in defining its powers, reads in part as follows:

> "Sec. 5. The City of Dallas * * * may license and regulate persons, corporations and associations engaged in any business, occupation, profession or trade; * * *."

The pertinent section of the ordinance involved in this case is as follows:

> "Sec. 8-28. Administering massage to person of opposite sex.
>
> "It shall be unlawful for any person to administer a massage as defined in Section 8-12 to any person of the opposite sex: provided, however, that this section shall not apply to any chiropractor, nor shall it apply to any registered physical therapists or registered nurse operating under the direction of a physician. (Ord. 7865, § 15; Ord. 8491, § 1.)"

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED

The ordinance under attack comprises one section of the Code of Civil and Criminal Ordinances of Appellee, City of Dallas, regulating massage establishments.

It will be noted that the regulatory section in question which prohibits a member of one sex from administering a massage to a member of the opposite sex, with the exceptions noted therein, does not prohibit but permits a masseur to administer a massage to a member of the male sex and a masseuse to administer a massage to a member of the female sex. The right to conduct a massage establishment business, after complying with the Code regulating massage establishments by securing a permit or license, is not prohibited but merely regulated.

The ordinance in question was enacted by Appellee City of Dallas pursuant to the powers vested in it by Article 1175, Subsection 23, Vernon's Annotated Civil Statutes, State of

Texas, and Section 5 of its Charter. A Home Rule City such as Appellee, has such powers as are lawfully conferred by its Charter and by Article 1175, Vernon's Annotated Civil Statutes. *City of El Paso v. State of Texas, 209 S. W. 2d 989.*

It is clearly established that the City of Dallas, a Home Rule City, by express Legislative authority, may regulate any business, occupation, profession or trade under its police powers and it is a settled principle of law that where the Legislature in terms gives a municipality power to pass ordinances of a specified and defined character, they cannot be successfully attacked as being unreasonable except on constitutional grounds though it may be so impeached if passed under merely incidental or general powers. *Chiming v. Baker, 75 S. W. 330; H. & T. C. Ry. Co. v. City of Dallas, 98 Tex. 396, 84 S. W. 648.*

It is also well settled that when a power is expressly granted by the legislature to a municipality the time, manner and necessity of exercising such power rests within the sound discretion of the governing body of the municipality. *Sitterle v. Victoria Cold Storage Co., 33 S. W. 2d 546.* Moreover, this Court is bound by the decisions of the highest courts of the states as to the powers of their municipalities. *Railroad Commission v. Los Angeles R. Corp., 280 U. S. 145, 74 L. ed. 234, 50 Sup. Ct. Rep. 71; Georgia R. and Power Co. v. Decatur, 262 U. S. 432, 438, 67 L. ed. 1065, 1073, 43 Sup. Ct. Rep. 613.*

The contention by Appellants that the ordinance in question violates the Due Process Clause of the Fourteenth Amend-

ment is untenable. The Appellee in enacting the ordinance acted well within the permissible scope of its police powers. "The police power is one of the least limitable of governmental powers, and in its operation often cuts down property rights." *Queenside Hills Realty Co. v. Saxl, 328 U. S. 80-85, 90 L. ed. 1096, 66 S. Ct. 850.* The Fourteenth Amendment does not act as a barrier against legislation intended to regulate lawful occupations which, because of their nature, may be injurious or offensive to the public. The police power extends even to the prohibition and otherwise legal calling if entwined with immoral practices and such practices can not be reached without the prohibition of such a calling. "A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the state thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law." *Booth v. Illinois, 184 U. S. 425, 429, 46 L. ed. 623, 626, 22 Sup. Ct. Rep. 425.*

The record in the case at bar shows that the Police Department of the City of Dallas was concerned with a real problem in the operation of massage establishments because of lewd

acts committed arising from the massaging of a person of one sex by a person of another sex. The undisputed record also shows that in an endeavor to correct this evil which existed in the City of Dallas for a period of several years, the Police Department of the City of Dallas made investigations and collected facts which were brought to the attention of the City Council of the City of Dallas with the recommendation that the ordinance in question be passed in an attempt to curb the evil which then existed.

Thus, an application of the foregoing well settled legal principles to the case at bar is but to demonstrate that the City Council of the City of Dallas acted well within the scope of its police powers in enacting the ordinance under attack. *Dunlop v. United States*, 165 U. S. 486, 498, 17 S. Ct. 375, 41 L. ed. 799.

Moreover, the Appellants' contention that the ordinance in question violates the Equal Protection Clause of the Fourteenth Amendment is equally untenable. The contention of Appellants that the ordinance in question does not treat all engaged in the business of professional massaging equally in that it deprives appellants of customers without regard for their employees' qualifications, fitness or abilities but solely on an arbitrary ground of sex is without merit.

Since the Council was faced with a particular evil, it had the authority to restrict its legislation to such an evil. It is well established that a statute or ordinance does not violate the Equal Protection Clause of the Fourteenth Amendment because it is not all embracing as a state or municipal corpo-

ration may direct its legislation against what it deems an existing evil without covering the whole field of possible abuses. In the case of *James-Dickinson Farm Mortgage Co. v. Harry, 273 U. S. 119, 71 L. ed. 569, 47 S. Ct. Rep. 308*, the Court in sustaining the constitutionality of a Texas Statute for a cause of action in a land purchase based on fraud against an attack on the constitutional grounds urged here, said:

> "It is claimed that the Texas statute violates the equal protection clause of the 14th Amendment because it applies only to fraud in transactions involving the purchase of real estate or of stock in a corporation or joint stock company. The contention is clearly unfounded. A statute does not violate the equal protection clause merely because it is not all-embracing. Zucht v. King, 260 U. S. 174, 177, 67 L. ed. 194, 198, 43 Sup. Ct. Rep. 24. A state may direct its legislature against what it deems an existing evil, without covering the whole field of possible abuses. Farmers & M. Bank v. Federal Reserve Bank, 262 U. S. 649, 661, 67 L. ed. 1157, 1164, 30 A.L.R. 635, 43 Sup. Ct. Rep. 651. The occasion of the legislation is indicated by the urgency provision of the statute which recites 'that there are now in this state a number of fraudulent land schemes and that a great number of citizens of this State have been defrauded thereby'."

The rules by which this contention must be tested were clearly stated by this Court speaking through Mr. Justice Van Devanter in the case of *Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 55 L. ed. 369, 31 Sup. Ct. Rep. 337*, when the Court said:

> "• • • 1. The equal protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of

the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

An application of these well established rules long followed by this Court clearly demonstrates that the Appellants have wholly failed to sustain the burden imposed upon them by law, since it is well settled that sex as a basis for legislative classification is constitutional. *Bosley v. McLaughlin, 236 U. S. 385, 35 S. Ct. 345, 59 L. ed. 632; Miller v. Wilson, 236 U. S. 373, 35 S. Ct. 342, 59 L. ed. 628; Allred v. Heaton, 336 S. W. 2d 251; certiorari dismissed, appeal denied, 361 U. S. 517, 5 L. ed. 2d 265, 81 S. Ct. 293.*

The statutes of the State of Texas contain numerous examples of legislation based upon a separate classification of the sexes. For example Art. 5177, Vernon's Annotated Civil Statutes, State of Texas, provides for separate toilets for each sex in factories, mills, workshops, mercantile establishments, laundries or other establishments, and Art. 5178, Vernon's Annotated Civil Statutes, prohibits the owner, manager, superintendent or other person in control or man-

agement of an institute from permitting conditions to exist calculated to injuriously affect the morals of female employees. *Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28* ployees. That "the constitutionality of a statute rests upon him who assails it, and the court may not declare a legislative discrimination invalid unless it is of such character as to preclude the assumption that the classification rests upon a basis with the knowledge and experience of the legislators." *Metropolitan Casualty Insurance Co. v. Brownell, 294 U. S. 580, 79 L. ed. 1070, 55 S. Ct. 538.*

Finally, this Court in the case of *Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 S. Ct. Rep. 324*, sustained the validity of a statute of that state providing that "no female shall be employed in any mechanical establishment, or factory, or laundry, for more than ten hours during any one day while sustained as to the work of an adult woman in a laundry, the Court saying:

> "* * * Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal, and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man."

Tested by the foregoing principles the legislative classification by sex in the ordinance in question does not offend the Equal Protection Clause of the Fourteenth Amendment. Therefore, this contention urged by Appellants does not present a substantial federal question because based upon the facts before the governing body of the City of Dallas, the ordinance represents a reasonable exercise of the police powers vested in that body.

The District Court of Appeals, Second District of California, in the case of *Ex parte Maki*, 76 Cal. App. 2d 645, 173 P. 2d 64, the Court had before it for construction a very similar ordinance of the City of Los Angeles containing almost the identical wording as the ordinance here which was attacked on the same constitutional grounds asserted in this case. The Court in that case, in holding that such an ordinance does not violate either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment, said:

> "* * * The reasonable exercise of the police power in regulating any occupation in order to maintain the moral welfare does not arbitrarily deprive a person so engaged of his property. The language of the ordinance and the evils intended thereby to be prevented make it clear that the intent of the city council was solely to serve the public welfare and not to oppress any class. The fact that a person by his occupation may be unable to gain certain profits as a result of the enforcement of regulatory measure is not a deprivation of his property without due process of law. Enactments that curb the vicious or restrain the wicked necessarily restrict the emoluments of his enterprise. However, such results are not to be considered in determining the validity of a law.

"There is nothing in the ordinance that denies the equal protection guaranteed by the Fourteenth Amendment. It applies to all alike who give massages for hire and who are not licensed to practice one of the arts of healing. An ordinance is not discriminatory so long as the distinction it makes relate reasonably to the object of the legislation. It is not arbitrary if any reasonable conceivable state of facts would sustain it. New York Rapid Transit Corp. v. City of New York, 303 U. S. 573, 578, 58 S. Ct. 721, 82 L. ed. 1024."

Thus, it is respectfully submitted that the ordinance in question is valid because it does not offend either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States and was enacted pursuant to the express and general police powers vested in Appellee.

CONCLUSION

The decision of the Texas Court of Civil Appeals as set forth on pages 1a through 13a of Appellants' Jurisdictional Statement, which was in effect affirmed by the Supreme Court of Texas by that Court's denial of Appellants' Application for Writ of Error, is in all respects correct; and upon that opinion and for the foregoing reasons Appellants' appeal should be dismissed.

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